GSA's

NEPA Call-In Update

FALL 1999

NEPA Call-In is GSA's National Environmental Policy Act (NEPA) information clearinghouse and research service.

NEPA Call-In is designed to meet the NEPA compliance needs of GSA's realty professionals.

CEQ Issues Memorandum on Cooperating Agencies Under NEPA

On July 28, 1999 George T. Frampton, Jr., Acting Chair, Council on Environmental Quality (CEQ), issued a memorandum to heads of Federal Agencies encouraging them to solicit state, tribal and local governments to be "cooperating agencies" in implementing the environmental impact assessment (EIA) process under NEPA. The memo also requests that Agency officials identify state, tribal and local government agencies which have jurisdiction by law or special expertise with respect to reasonable alternatives or significant environmental, social, or economic impacts associated with a proposed action that requires the preparation of an EIS. Agencies can refer to Appendix II of the CEQ regulations, "Federal and Federal-State Agencies with Jurisdiction by Law or Special Expertise on Environmental Quality Issues," Vol. 49 Federal Register, No. 247, 49754-49778 (December 21, 1984) for guidance on the types of actions and expertise relevant in determining appropriate cooperating agencies.

According to the CEQ memo, there are several benefits to designating non-Federal agencies as cooperating agencies. These benefits include disclosure of relevant information early in the NEPA process; receipt of technical expertise and staff support; avoidance of duplication of procedures with state, tribal and local governments; and establishment of a mechanism for addressing inter-governmental issues.

Cooperating Agency relationships with state, tribal and local agencies help achieve the NEPA objective "to promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

If a non-Federal Agency agrees to become a cooperating Agency, Federal agencies are encouraged to document their expectations, roles and responsibilities, including issues such as preparation of analysis, schedules, and availability of pre-decisional information. Contact NEPA Call-In at (202) 208-6228 for a copy of the CEQ memo, or find it on the NEPA Call-In web page at: http://www.gsa.gov/pbs/pt/call-in/ceqpg1.gif; /ceqpg2.gif; and /ceqpg3.gif.

Coordinating NEPA With New Section 106 Regulations

NEPA Call-In researchers recently attended the National Preservation Institute seminar "Section 106: Working with the Revised Regulations," which was taught by Dr. Thomas F. King. Of particular interest was Dr. King's discussion of coordinating NEPA with the new National Historic Preservation Act (NHPA) Section 106 regulations. The new Section 106 regulations are codified in Title 36 Code of Federal Regulations (CFR) Section 800 (for more information on the new regulations, see the Summer 1999 issue of NEPA Call-In Update, or contact NEPA Call-In).

Dr. King stated that agencies should consider their Section 106 responsibilities early in the NEPA process, and plan their public participation, analysis, and review so they can meet the purposes and requirements of both statutes. Agency officials may use the process and documentation required for the preparation of an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) to comply with Section 106 in lieu

Continued on page 2

In This Issue

Coordinating NEPA With Section 106, continued from page 1

GSA Moves Forward With Wetlands Desk Guide

GSA's Office of Business Performance is moving forward with developing revised guidance on wetlands, according to Mr. Colin Wagner, NEPA Liaison. The effort will focus on developing a concise Wetlands Impact Management Desk Guide. GSA's existing wetlands guidance, ADM 1095.2, "Consideration of floodplains and wetlands in decisionmaking," dates to 1979. The ADM delegates responsibilities to GSA offices that no longer exist, and does not address Clean Water Act (CWA) Section 404 permit requirements for impacting wetlands.

The CWA is the single most important piece of legislation regulating activity in wetlands. The CWA sets the basic structure for regulating discharges of pollutants to U.S. waters. In many cases, discharge of dredged or fill material into a wetland requires a USACE permit. Although the USACE regulations do not explicitly address construction in wetlands, they define "discharge" to include the placement of pilings. Since any form of construction in a wetland requires either the placement of earth or masonry fill or the placement of pilings, for all practical purposes any construction in a wetland is subject to the USACE regulations.

Section 404 is administered jointly by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE). USACE oversees the day-to-day administration of the program and issues permits for construction in wetlands. USACE, EPA, the U.S. Fish and Wildlife Service, and the public rigorously examine wetland permit applications. State and local governments also have additional laws and regulations that must be followed, and permit applicants must obtain state water quality certifications before a Section 404 permit can be issued.

of the procedures set forth in 36 CFR Sections 800.3 to 800.6 if Agency officials have notified the State Historic Preservation Officer (SHPO)/Tribal Historic Preservation Officer (THPO) and the Advisory Council for Historic Preservation (ACHP) that they intend to do so. Agency officials should ensure that preparation of the EA and EIS includes proper scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

All historic properties should be identified and effects of the undertaking should be assessed and consistent with 36 CFR Section 800.4 to 800.5. Scope and timing may be phased to reflect the Agency official's consideration of project alternatives in the NEPA process. Each site must receive equal analysis and the level of Section 106 analysis should be commensurate with the level of NEPA analysis. All effects of the undertaking should be discussed with the consulting parties early in the NEPA process. This enables all parties to express their opinions when there is a wide range of alternatives being considered. The public should also be involved.

The Agency official should submit the EA, Draft EIS (DEIS), or EIS to the SHPO/THPO, Indian Tribes, and Native Hawaiian organizations that might attach religious and cultural significance to the affected historic properties, and other consulting parties prior to or while making the document available to the public for comment. If the document is a DEIS or an EIS, the Agency official should submit it to the ACHP for review. Consulting parties or the ACHP (if they are reviewing the documents) may object to the Agency official's EA, DEIS, or EIS by stating that they have not met the standards set forth in 36 CFR Section 800.8(c)(1) or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS, or EIS is inadequate. If the SHPO/THPO, Indian tribes, Native Hawaiian organizations, or other consulting parties find the EA, DEIS, or EIS inadequate, the Agency official should then refer the issue to the ACHP.

Within 30 days, the ACHP shall notify the Agency official that it agrees with the objection or disagrees with the objection. Failure of the ACHP to respond within 30 days is considered disagreement with the objection.

If the Agency official has found during the preparation of the EA, DEIS or EIS that the effects of the undertaking on historic properties are adverse, the Agency official should specify in the FONSI or ROD the proposed measures to avoid, minimize or mitigate such effects and ensure that the approval of the undertaking is conditioned accordingly. The Agency official's responsibilities under Section 106 are then satisfied when either the proposed measures have been adopted or the ACHP has commented and received the response to comments.

When the NEPA process results in a FONSI, the Agency official must adopt a binding commitment through a Memorandum of Agreement (MOA). An MOA accompanying a FONSI should include the fact that reasonably forseeable impacts on historic properties will not be significant. If the NEPA process results in an EIS and ROD, the binding commitment does not have to be in the form of a MOA.

If the undertaking is modified after approval of the FONSI or ROD in a way that ultimately alters its effects on historic properties, or if the Agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects are carried out, the Agency official must notify the ACHP and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA.

An adverse effect under Section 106 does not necessarily indicate that there will be environmental effects under NEPA and vice versa. This fact is illustrated throughout the NEPA/Section 106 coordinated process. For example, because something is categorically excluded under NEPA, does not mean it is excluded under Section 106. The Agency official is required to determine if it still qualifies as an undertaking requiring review under Section 106. If so, the Agency official must proceed with Section 106 review in accordance with Section 800.3(a). Another illustration of this issue is that a finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

An Interview with a NEPA Practitioner

Periodically, NEPA Call-In interviews NEPA experts and others in the environmental field. This issue, we spoke with Ms. Dinah Bear, General Counsel of the President's Council on Environmental Quality (CEQ). Ms. Bear joined CEQ as Deputy General Counsel in 1981, and was appointed General Counsel in 1983.

CEQ has the statutory responsibility for advising the President on environmental matters, developing environmental policy, and coordinating interagency implementation of policy. CEQ also prepares the President's annual environmental quality report, and oversees agencies' implementation of NEPA, which is the statutory basis for the environmental impact assessment process. CEQ monitors Federal Agencies' compliance with NEPA, and helps to resolve issues brought to the Council's attention by Federal, state and local agencies, as well as by public interest organizations and private citizens.

Ms. Bear has chaired the Standing Committee on Environmental Law of the American Bar Association and the Steering Committee of the Environment, Energy and Natural Resources Division of the District of Columbia Bar. She has received the Distinguished Service Award from the Sierra Club and the Chairman's Award from the Natural Resources Council of America.

We have heard you will be assuming Ray Clark's responsibilities now that he has left CEQ. Will this be in addition to your current responsibilities as General Counsel?

I have been active in CEQ's work to oversee NEPA since joining the Agency in 1981 and I will continue to be involved in working with the agencies and the public, as is Ellen Athas, Deputy General Counsel at CEQ. However, we are actively looking for a replacement for Ray Clark, and hope to have a new person on board this Fall.

Name: *Dinah Bear*
Job Title: *General Counsel of the President's Council on Environmental Quality (CEQ)*

The Advisory Council on Historic Preservation recently issued revised National Historic Preservation Act Section 106 regulations fostering coordinated NEPA compliance with Section 106 consultation. Do you foresee any changes to CEQ's current NEPA implementation regulations, or do they adequately fulfill the intended goals of NEPA?

We are very pleased that the Advisory Council's regulations recognize the desirability of integrating NEPA and the 106 process under the National Historic Preservation Act. The CEQ regulations have long encouraged this type of integration. For example, 40 CFR 1502.25 states that, "To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by....The National Historic Preservation Act of 1966 (19 U.S.C. 470 et seq.)....and other environmental review laws, and Executive Orders."

I do not believe the CEQ regulations need to be amended to take this development into account; rather, I think the change in the Advisory Council's regulations encourage agencies to fully implement our regulation on this point. I also do not anticipate major changes to the CEQ's NEPA regulations as a whole.

"We are very pleased that the Advisory Council's regulations recognize the desirability of integrating NEPA and the 106 process under the National Historic Preservation Act."

— Dinah Bear

What are the most common mistakes made with NEPA compliance or NEPA documents?

While it's always dangerous to speak in generalities, I would say that one of the most common mistakes we see at CEQ is a failure on the part of agencies to seriously analyze alternatives developed outside of the Agency. Increasingly, citizens' groups, state, local or tribal governments are expending considerable effort to develop alternatives that meet in whole or part the Agency's stated purpose and need. In our view, agencies should welcome this development and seriously analyze and consider such alternatives. However, we do see serious resistance to such analysis at times.

Additional problems we see frequently include problems with the purpose and need of the proposed actions: either a purpose and need statement that is stated in a very narrow way that supports only the preferred alternative, or, conversely, a purpose and need that is so broad as to be almost meaningless. Either extreme inevitably leads to problems in the alternatives analysis. Considerably more thoughts should be given early in the process about the real purpose and need for the proposed action.

Length and readability remain constant problems in many NEPA documents. Length is not an indicator of good analysis; frequently, it simply means no one has taken the time to do a good editing job. Often, a NEPA document will contain lots of pages but little analysis that is relevant to the decision making at hand. Sometimes documents are so technical that no one but the authors' peers can intelligently review it.

Continued on next page

What changes to NEPA do you anticipate for the future?

I believe the fundamentals for the NEPA process will remain unchanged because they make sense. However, I do think that how we implement the process will continue to evolve. One change on the horizon for some agencies is the nature of involvement from state, local and tribal governments. In some areas of the country, these other governmental entities are becoming much more interested in participating in the NEPA process as a cooperating Agency. At CEQ, we believe this is a good trend. George Frampton, Acting Chair, issued a Memorandum to Heads of Agencies regarding "Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of NEPA" (July 28, 1999) [see related story on this memo, page 1].

"The purpose of NEPA—and environmental laws in general—is not to stop projects, but to make sure that they are conceived of and implemented in the wisest manner possible."
— Dinah Bear

The process will also continue to evolve through the necessity of addressing new and emerging issues. One of the strengths of NEPA is that it serves as a vehicle for addressing all kinds of environmental effects—whether the traditional air, water and wildlife issues or issues like urban sprawl or climate change.

What do you say to those who review NEPA or environmental compliance as an obstacle to a project?

The purpose of NEPA—and environmental laws in general—is not to stop projects, but to make sure that they are conceived of and implemented in the wisest manner possible. Occasionally, information developed through compliance with environmental laws may indeed cause people to rethink the wisdom of proceeding with a particular course of action. In thinking about history, we can all think of examples of actions that in hindsight, probably should not have proceeded as they did. The whole point of the NEPA process is, to the extent possible, think about issues before, rather than after, the action has taken place.

Outside of filing an EIS with the EPA, there aren't any oversight provisions to ensure that an Agency's NEPA compliance is conducted properly. There are several software products on the market that claim they can help an Agency conduct NEPA analysis in as little as 15 minutes. Do you see that as a potential problem?

First, I would add to your observations regarding NEPA oversight. Oversight of the NEPA process is conducted primarily by CEQ, through consulting with agencies about their NEPA procedures generally and addressing specific issues raised either by the Agency internally, other Federal agencies, or members of the public or state, local or tribal governments. While most of our oversight is conducted on an informal basis, there is also a formal interagency dispute resolution process.

EPA's involvement in NEPA is much more substantive than simply filing the EISs. EPA reviews most EISs and rates draft EISs for adequacy, along with providing technical comments. Other agencies with expertise in particular areas, such as the U.S. Fish and Wildlife Service, also contribute to the process.

Finally, some agencies have administrative appeals processes that address NEPA concerns and, of course, the Federal courts are the last resort for parties who believe an Agency has failed to comply with NEPA.

In regards to the 15 minute NEPA program: for anything other than an action that is normally categorically excluded, I have difficulty seeing how adequate environmental analysis—let alone public involvement—can take place in that short period. However, I would hasten to add that I haven't reviewed these programs.

CEQ sponsors NEPA implementation training at Duke University that is attended by contractors and regional Federal Agency NEPA practitioners. Are there any plans for CEQ to offer courses for senior executive decision-makers who bear the overall Agency responsibility?

Occasionally, we have convened a group of senior executive decision-makers to discuss NEPA, or we have met with decision-makers in individual agencies. The suggestion of offering a senior executive course at Duke is an interesting one, which we will consider.

What do you believe to be the most important accomplishment of NEPA?

I believe the single most important accomplishment of NEPA is the recognition at the national level that consideration of the environment is an absolutely integral and legally mandated component of Federal decision making. Second, I believe NEPA expands significantly the opportunities for everyone to be involved in Federal decision making.

"I believe the single most important accomplishment of NEPA is the recognition at the national level that consideration of the environment is an absolutely integral and legally mandated component of Federal decision making."
-- Dinah Bear

Interesting TIs

TI-0551—GSA Regulations on Disposing of Property with Environmental Contamination

NEPA Call-In received a request for guidance on GSA's existing policy regarding disposing of property with environmental contamination. Specifically, the caller stated that the property contained contaminated soil from an Underground Storage Tank (UST), and wanted to know if GSA could dispose of the property prior to remediating the soil contamination.

NEPA Call-In reviewed the GSA Intranet document library on "Insite" and found one document pertaining to disposing of property with environmental contamination (including soil contamination): GSA Order PBS P 4001.1, "Excess and Surplus Real Property," Chapter 5, "Environmental, Historic, and Coastal Zone Management Considerations." This document references CERCLA Section 120(h)(3), created by the Superfund Amendments and Reauthorization Act (SARA). SARA requires full disclosure of all known hazardous substance activity and specifies covenants be provided in deeds for disposal of Federal property. If the proposed property disposal action is from GSA to another Federal Agency, no deed is involved and Section 120(h)(3) "Contents of Certain Deeds" does not apply. For all transfers CERCLA Section 120(h)(1) "Notice" and (2) "Form of notice; regulations" requires that a notice regarding hazardous substance activity be provided in *any* contract for the sale or transfer of real property.

NEPA Call-In then searched its files and found the Office of Property Disposal's "Environmental Guidebook for Realty Specialists." The Guidebook states that in regard to Reports of Excess (ROEs), Title 41 Code of Federal Regulations (CFR) Party 101-47.202-2(b)(10) requires that each ROE include a statement indicating whether or not, during the time the property was owned by the United States, any hazardous substance activity took place on the property. If such activity took place, the holding Agency must include information to GSA on the type and quantity of such hazardous substance and the time at which such storage, release, or disposal took place.

The holding Agency must also advise GSA if all remedial action necessary to protect human health and the environment with respect to the hazardous substance activity has taken place before the date the property was reported as excess. If such action has not been taken the holding Agency must advise GSA when the action will be completed. If no hazardous substance activity took place, the reporting Agency must include a statement that indicates this.

If the hazardous substance activity has been brought to the attention of GSA, GSA will incorporate the information into the "Invitation for Bid" and include a statement that describes the type and quantity of hazardous substances; the time at which storage, release or disposal took place; a description of the remedial action taken; and a statement that the action has been completed. This statement is outlined in the Guidebook. The Guidebook states that GSA's current reading of CERCLA places the burden of performing the clean parcel identification on the holding Agency.

NEPA and other environmental statutes may also apply to real property disposal in this situation. The PBS NEPA Desk Guide provides guid-

Continued on next page

Status of NEPA Desk Guide and the E-Book

On October 19, 1999, GSA Administrator David J. Barram signed ADM 1095.1F, "Environmental Considerations in Decision Making." With this action, the PBS NEPA Desk Guide changed from "interim" to "final" status. The NEPA Desk Guide will be printed in the next few weeks and copies will be sent to all GSA Regional Environmental Quality Advisors for distribution within their region, and to others who have requested a copy. Also of note, on October 4, Mr. George T. Frampton, Jr., CEQ Acting Chair, wrote to Administrator Barram, saying "GSA's regulations are exceptionally complete and concise and that the new desk guide is one of the most useful NEPA manuals in the Federal government. I understand that GSA's Environmental Quality Advisory Group was responsible for this effort. I hope you will pass along our recognition of their fine work..."

In addition, over the last year NEPA Call-In has been working diligently to finish the long awaited Environmental Book or "E-Book," as it has been commonly called. NEPA Call-In has overcome many obstacles, including software problems and logistics of distributing and updating the final E-Book. As a result, we are in the process of converting the training module to a web-based product.

The "E-Book" is an interactive training program that will help realty specialists, asset managers, and other GSA realty professionals learn about compliance with NEPA and the National Historic Preservation Act (NHPA). The "E-Book" will guide the user through a step-by-step process of NEPA and NHPA Section 106 compliance as it relates to specific GSA actions. This training module is also intended to be a reference tool for experienced GSA realty personnel.

NEPA Call-In is anticipating the completion of the "E-Book" by the end of October. At that time we plan to schedule pilot presentations in several regions and field offices. These presentations are intended to provide the regions with an overview of the "E-Book." Any region interested in receiving training on the "E-Book" should contact NEPA Call-In at (202) 208-6228.

Interesting TIs (con'd)

ance on NEPA analysis and can be found on our website at www.gsa.gov/pbs/pt/call-in/erl/deskref/deskref.htm.

NEPA Call-In also contacted Mr. John Q. Martin, Director, Redeployment Service Division, GSA National Office, regarding the inquiry. He stated that the Department of Defense (DoD) has guidance on the early transfer authority—the National Defense Authorization Act For Fiscal Year 1997, Section 334 "Authority to Transfer Contaminated Federal Property Before Completion of Required Response Actions"; and the U.S. Environmental Protection Agency has guidance on transferring contaminated property to Potentially Responsible Parties (PRPs)—"EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120 (h)(3)." Unless the GSA property in question fits one of these two scenarios, the guidance is not applicable.

NEPA Call-In also contacted Mr. Jim Biederman, Office of General Counsel, GSA National Office. Mr. Biederman stated that pending final site cleanup, GSA can dispose of contaminated property so long as there are institutional control deed restrictions that are protective of public health and the environment.

TI-0574—Can a FONSI Be Issued Prior to Completing the Section 106 Process?

NEPA Call-In recently received a request for guidance on the following: 1) Can you prepare and issue a Finding of No Significant Impact (FONSI) prior to completion of Section 106 of the National Historical Preservation Act (NHPA); 2) Can a FONSI be issued if historic properties will be destroyed; 3) If Section 106 is completed and results in no Memorandum of Agreement (MOA) or mitigation, are you required to do an EIS; and 4) Can a "mitigated FONSI" be issued if an MOA is received from the State Historic Preservation Officer (SHPO)?

Question 1

NEPA Call-In reviewed the PBS NEPA Desk Guide, Interim Guidance, September 1997. Section 6.4,"Timing" states that you must complete any required consultations under the NHPA before you sign a FONSI, even though completing consultation does not necessarily constitute closure of the Section 106 process. The Desk Guide further states that mitigation agreed to through these consultations may be carried out after the FONSI is issued, and must be stipulated in the FONSI. Therefore, a FONSI can be prepared and issued prior to completion of the Section 106 process but not before consultations with the SHPO have been completed.

The Desk Guide also states that an EA can be used to document the consultation process under Section 106 regulations, or provide an EA to the SHPO to support a GSA determination under the same regulations. It further states that it is imperative that the requirements of the other law be reflected by the EA. The caller mentioned that an EA has already been completed for this project. Since new information about the project will likely result from the Section 106 process, we advised the caller that they may wish to complete a Supplemental EA to incorporate the results of Agency consultations with the SHPO into the EA upon conclusion of the Section 106 process. GSA guidance on Supplemental EAs can be found in Chapter 8 of the Deskguide, "Supplements and Revisions to NEPA Documents." We advised the caller that they may also wish to consider issuing the current EA in draft form for public review, making a statement concerning ongoing consultation regarding impacts to historic properties. The EA can then be published in final format subsequent to completion of Section 106.

Question 2

NEPA Call-In reviewed the PBS NEPA Desk Guide Chapter 6, "Environmental Assessments," Section 6.10.1, "Finding of No Significant Impact - Definition." Section 6.10.1 states, "A mitigated FONSI may be especially appropriate where the only anticipated impacts will be on historic properties, and mitigation is agreed to under the regulations for Section 106 of the NHPA (36 CFR 800). The mitigation measures agreed to must be specified in the FONSI, and must be sufficient to reduce the impacts of the project below a significant level."

NEPA Call-In also reviewed Section 106 regulations, specifically Title 36 Code of Federal Regulations (CFR) 800.8 (a)(1), which states that a finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

NEPA Call-In also reviewed the CEQ document "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" for further guidance on mitigated FONSIs. Question 40 asks: "If an environmental assessment indicates that the environmental effects of a proposal are significant but that, with mitigation, those effects may be reduced to less than significant levels, may the Agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping?" The CEQ answer states: "Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or Agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement."

In summary, it is possible to issue a FONSI even though historic properties may be destroyed.

Question 3

NEPA Call-In did not locate any information that would require completing an EIS if no MOA is issued; however, there are several steps

Continued on next page

Interesting TIs (con'd)

under Section 106 that must be completed prior to commencing with the undertaking. NEPA Call-In reviewed Title 36 CFR 800.6(b)(1)(v), which states that: "If the Agency Official and the SHPO/THPO fail to agree on the terms of a Memorandum of Agreement, the Agency Official shall request the Council to join the consultation and provide the Council with the documentation set forth in Section 800.11(g). If the Council decides to join the consultation, the Agency Official shall proceed in accordance with Section 800.6(b)(2)." This section states: "If the Council decides to participate in the consultation, the Agency Official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under Sec. 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the Agency Official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a Memorandum of Agreement."

If the Council decides not to join the consultation, the Council will notify the Agency and proceed to comment in accordance with Section 800.7 (c). NEPA Call-In also reviewed 36 CFR 800.7(c), which states:

> *"The Council shall provide an opportunity for the Agency Official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the Agency Official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation. The Council shall provide its comments to the head of the Agency requesting comment with copies to the Agency Official, the Agency's Federal Preservation Officer, all consulting parties, and others as appropriate. The head of the Agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(1) of the Act directs that the head of the Agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the Agency head's decision shall include: preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking; providing a copy of the summary to all consulting parties; and notifying the public and making the record available for public inspection."*

Question 4

A mitigated FONSI can be issued if an MOA is agreed upon with the SHPO. A FONSI may also be issued in this case because as 36 CFR 800.8 (a)(1) states, a finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

Again, according to the Desk Guide Chapter 6, "Environmental Assessments," Section 6.10.1, Finding of No Significant Impact - Definition, "A mitigated FONSI may be especially appropriate where the only anticipated impacts will be on historic properties, and mitigation is agreed to under the regulations for Section 106 of the NHPA (36 CFR 800). The mitigation measures agreed to must be specified in the FONSI, and must be sufficient to reduce the impacts of the project below a significant level."

TI-0593—GSA Guidance on Radon

NEPA Call-In staff received a request for guidance related to radon. The caller stated GSA obtained a Phase I Environmental Site Assessment (ESA) submitted by an offeror of undeveloped land. The Phase I ESA includes results of a radon survey for a house adjacent to the property GSA wishes to acquire. The results of the radon survey indicate that 9% of the samples in the basement of the house show radon levels between 4 and 20 picocuries per liter (pCi/L). Specifically, the caller wanted to know if the results should be of concern to GSA in acquiring property. The caller also wanted any GSA or other guidance on radon.

NEPA Call-In reviewed the GSA Technical Guide "Radon in Air," March 1995, which was prepared by the former PBS Environmental Management Division. This document describes GSA's radon program, which consists of testing, Agency notification of radon testing results, mitigation of all spaces with readings at or above the GSA action level, and retesting of these areas. This document states that when radon levels are at or above 4 pCi/L (based upon EPA guidelines for residential housing) mitigation is to be performed by GSA for GSA-owned space, or the lessor for leased space. After mitigation, the area is to be retested for at least 90 days until levels are less than 4 pCi/L. This document also states that a condition of occupancy is to have the air tested for radon. Since there is no structure yet to be occupied on the property, GSA's testing policy does not apply to this situation. Because the property is unimproved, and radon tends to accumulate in confined spaces over time, testing for radon in this situation would not yield meaningful results. However, since a radon survey in an adjacent building indicates a small degree of elevated radon levels (9% of the samples taken are between 4 and 20 pCi/L), NEPA Call-In suggests conducting radon surveys according to EPA guidelines for any future occupied structure on the site in question. If elevated radon levels are found at 4 pCi/L or above in any future structure, then GSA should mitigate to lower the radon to acceptable levels.

Continued on next page

Interesting TIs (con'd)

NEPA Call-In also reviewed GSA Orders on the "Insite" intranet site for references to radon and found GSA Order PBS P 5800.36A, "Property Management Business Practice Handbook." The order provides the following guidance on radon in air and in water:

> *"In air. Before or, if necessary, concurrent with occupancy, test for radon in GSA-owned and leased space for at least 91 days with alpha track detectors or electret ion chambers, using EPA-listed devices and EPA proficient laboratories, in areas in contact with the ground which are occupiable or routinely visited. Where GSA does not control space with ground contact, test the lowest floor of Government occupancy, if one or two floors above the ground. For leased space, ensure lessors test radon levels. Mitigate radon levels which equal or exceed the applicable EPA standards or, if none, the level specified in GSA technical guidance. After mitigation, retest the area for at least 91 days with alpha track detectors or electret ion chambers. Continue the mitigation and retesting cycle until levels are less than the level specified above. Retest when structural or operational changes occur that may affect the mitigation or increase radon to or over the level specified above.*
>
> *In water. Test nonpublic water sources for radon according to GSA and EPA procedural guidance. Mitigate when radon levels equal or exceed the EPA standards or if none, the level specified in GSA technical guidance. After mitigation, retest the water supply. Continue the mitigation and retesting cycle until level is less than the level specified above."*

NEPA Call-In then contacted an industrial hygienist in a GSA region to confirm the meaning of the sentence: "Where GSA does not control space with ground contact, test the lowest floor of Government occupancy, if one or two floors above the ground." The representative stated that the sentence means if the government occupies the ground floor (floor one) or the next floor (floor two), then GSA should test those floors, but any floor higher than that would not have to be tested.

NEPA Call-In also reviewed the Fact Sheet "Summaries of NEPA, Associated Laws and Executive Orders." According to the Toxic Substance Control Act (TSCA) of 1976, Title III "Indoor Radon Abatement," indoor air in buildings of the United States should be as free of radon as the outside ambient air. TSCA, Title III "Indoor Radon Abatement," Section 2669 states: "The head of each Federal Department or Agency that owns a Federal building shall conduct a study for the purpose of determining the extent of radon contamination in such buildings. Such study shall include, in the case of a Federal building using a nonpublic water source (such as a well or other groundwater), radon contamination of the water." The deadline for this study was no later than June 1, 1990.

NEPA Call-In then searched EPA's radon web site at www.epa.gov/iaq/radon/ and found information on EPA's position on radon, frequently asked questions about radon, and information on radon-resistant new construction. We also learned that there is an Indoor Air Quality Information Clearinghouse at (800) 438-4318. We contacted the clearinghouse and asked if GSA should be concerned about radon on an adjoining property. We were told that GSA cannot determine what the levels of radon are going to be based upon the radon levels of adjacent property. In addition, radon levels in buildings are significantly influenced by construction methods.

Based upon the above information, GSA should be concerned about potential radon contamination on the property it may acquire and conduct testing when the building is constructed. In addition, given the potential for radon, GSA may also want to consider how the building design could be modified to account for this issue. However, if the building does have radon contamination, potential remediation costs to GSA is likely to be low compared to the overall cost of the project.

NEPA Call-In is designed to meet the NEPA compliance needs of GSA's realty professionals.

Need more information?
Call NEPA Call-In
(202) 208-6228
FAX: (202) 219-7677
E-mail address: nepa.callin@gsa.gov
Internet address: www.gsa.gov/pbs/pt/call-in/nepa.htm

NEPA Call-In Update
Fall 1999
TI-603

Printed on recycled paper